No. 78-873

In the Supreme Court of the United States

OCTOBER TERM, 1978

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, ET AL., PETITIONERS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners, the Board of Education of the City School District of the City of New York and its Chancellor, seek review of a court of appeals judgment affirming the decision of the district court which upheld the determination by the United States Department of Health, Education, and Welfare that petitioners were ineligible to receive a grant of federal financial assistance under the Emergency School Aid Act, 20 U.S.C. 1601 *et seq.*, for the 1977-78 school year. Contrary to the petitioners' contention, the decision of the court of appeals does not conflict with this Court's ruling in *Regents of the University of California* v. *Bakke*, No. 76-811 (June 28, 1978), and raises no question warranting review by this Court.

1. In January, 1977, petitioners submitted applications to the appropriate officials of the Department of Health, Education, and Welfare for funds provided by the Emergency School Aid Act, 20 U.S.C. 1601 *et seq.* ("ESAA") for the 1977-78 school year. Under the ESAA program, federal financial assistance has been provided by Congress to achieve three statutory purposes (20 U.S.C. 1601(b)):

> (1) to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools;
>
> (2) to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students; and
>
> (3) to aid school children in overcoming the educational disadvantages of minority group isolation.

Local educational agencies like the petitioners and other eligible organizations compete on an annual basis for a limited amount of financial assistance by submitting plans designed to achieve one or more of these statutory goals, and the applications are ranked according to criteria set out in the statute, 20 U.S.C. 1609(c), as implemented by HEW's regulations, 45 C.F.R. 185.14. By the terms of the statute (20 U.S.C. 1605(d)(4)), no application for assistance can be approved by the Assistant Secretary for Education without a determination that the applicant is not ineligible by virtue of the criteria set out in 20 U.S.C. 1605(d)(1) because it has engaged in specific forms of discrimination (see note 1, *infra*).

Petitioners' basic grant application survived the program merit competition and obtained a sufficient rank

order to be considered for funding in the amount of $3,559,132 (Pet. App. 19). However, HEW determined that the application was ineligible for funding under the regulation found in 45 C.F.R. 185.43(b)(2) as a result of "the assignment [by petitioners] of full-time classroom teachers to [its] schools * * * in such a manner as to identify [one or more] of such schools as intended for students of a particular race, color, or national origin."[1]

2. After pursuing the administrative remedy provided by the statute, petitioners filed a complaint on September 27, 1977, challenging the denial of ESAA funds. They contended that HEW had not determined that petitioners had engaged in intentional discrimination in making the admittedly racially identifiable teacher assignments. The district court initially granted summary judgment in favor of HEW, but, on reargument, remanded the matter to HEW so that petitioners would be given an opportunity to rebut the prima facie statistical evidence of discrimination in teacher assignment (Pet. App. 105-107). On remand, HEW determined that petitioners had discriminated in teacher assignment in violation of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, as well as having failed to establish eligibility for a grant under the ESAA.

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[1]This regulation implements the provision in 20 U.S.C. 1605(d)(1)(B) making ineligible for funding an applicant which has, after June 23, 1972—

> engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees * * * [.]

The regulation also takes into account 20 U.S.C. 1602(a) which provides:

> It is the policy of the United States that guidelines and criteria established pursuant to this chapter shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

Upon review of the administrative record, the district court affirmed the determination of HEW as supported by substantial evidence and dismissed petitioners' complaint.[2] The court of appeals affirmed the judgment of the district court "on the basis that the standards of the statute and regulation have been satisfied" (Pet. App. 3).

3. Petitioners seek this Court's review of an agency's determination, upheld by two courts, that they are ineligible for a grant of federal financial assistance because they failed to meet the specific eligibility requirements set out in the statute authorizing assistance. Although petitioners claim that this case involves an incorrect interpretation by the court of appeals of the standard of proof required to establish a violation of Title VI of the Civil Rights Act of 1964, as applied by this Court in *Regents of the University of California* v. *Bakke*, No. 76-811 (June 28, 1978) (Pet. 10-12), a reading of the opinion filed by the court below demonstrates that it based its decision solely on the requirements of the ESAA statute itself (Pet. App. 23; footnote omitted):

> While appellants argue that HEW's decision to deny ESAA funds relies solely on statistical evidence of disparate impact, contrary to Supreme Court cases construing the Fourteenth Amendment, we need not reach the question whether the evidence supports a finding of purposive segregative intent. Because we are dealing with an act of Congress, as amplified by HEW regulations, and not with a judicial determination whether certain acts have produced a Fourteenth Amendment violation, it is permissible for Congress to establish a higher standard, more protective of minority rights, than constitutional minimus require.

[2]A copy of the district court's order of April 18, 1978, is being lodged with the Clerk.

This Court has repeatedly and consistently upheld the power of Congress to impose reasonable conditions on the receipt of federal grants of financial assistance. *E.g., State of North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (E.D. N.C. 1977), aff'd mem., 435 U.S. 962 (1978); *Lau* v. *Nichols*, 414 U.S. 563, 569 (1974); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143 (1947); *Helvering* v. *Davis*, 301 U.S. 619 (1937); *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). As the court of appeals recognized (Pet. App. 25), in the ESAA program, Congress intended that school districts be found ineligible for grants not only because of discrimination which would be unconstitutional under the Fourteenth Amendment but also for "discrimination evidenced simply by an unjustified disparity in staff assignments." Here, the evidence as described by the court of appeals (Pet. App. 13-18) demonstrates that petitioners had assigned teachers to schools in a racially identifiable manner and were thus ineligible for assistance under the statute (20 U.S.C. 1605(d((1)(B)) and its implementing regulation (45 C.F.R. 185.43(b)(2)).[3]

[3]We are far from implying that the evidence would not support a finding of violation under Title VI of the Civil Rights Act of 1964 or the Equal Protection Clause. On the contrary, HEW determined, in an administrative proceeding required by the district court, that petitioners' teacher assignments were illegal under the Fourteenth Amendment and Title VI (Pet. App. 22), and the district court affirmed that determination as based on substantial evidence in the record (*ibid.*). These conclusions seem appropriate since "teacher assignment is so clearly subject to the complete control of school authorities * * * that the assignment of an overwhelmingly black faculty to black schools is strong evidence that racial considerations have been permitted to influence the determination of school policies and practices." *Kelly* v. *Guinn*, 456 F. 2d 100, 107 (9th Cir. 1972), cert. denied, 413 U.S. 919 (1973). See also *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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